IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561.

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

Petitioners,

v.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This cause comes before the court upon writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, granted November 21, 1927. (R. 668.)

Opinions of the Lower Courts.

The opinion of the Circuit Court of Appeals is reported at 20 Fed. (2nd) 837. It is also found in the record at page 595, and is set forth as Appendix II at page 51 of our petition for writ of certiorari heretofore filed in this court.

The opinion of the District Court is reported at 8 Fed. (2nd) 998. It is also found in the record at page 542, and is set forth as Appendix I at page 29 in said petition for writ of certiorari.

Judgment and Orders to Be Reviewed.

The judgment to be reviewed is that of the Circuit Court of Appeals, entered June 7, 1927, at record pages 610-611. This judgment reversed the decree of the District Court entered January 30, 1926 (R. 563), and remanded the case for further proceedings in compliance with the appellate court's opinion.

The court also is asked to review an order of the Circuit Court of Appeals, entered August 30, 1927, (R. 664), denying the motion (R. 635) of these petitioners to remand the case to the state court whence, we said, it had been improperly removed. That motion was a repetition of similar motions made by these petitioners, and overruled, in the District Court before the trial (February 2, 1925; R. 194-7).

Jurisdiction of This Court.

The Supreme Court of the United States has jurisdiction of this cause under former Section 240 (a) of the Judicial Code as amended, now Section 347 of Title 28, United States Code of Laws in force December 6, 1926.

The Issues and Errors.

The claims advanced, and the rulings made, in the Circuit Court of Appeals, which are relied upon as the basis of this court's jurisdiction, present questions of (a) equity jurisdiction, and (b) federal jurisdiction.

No other issue in the case has been decided below, and, under (1927) *Steele* v. *Drummond*, ... U. S. .....; 48 S. C. Rep. 53, no other issue may be presented.

(a) Equity Jurisdiction.

1. The petitioners contended that equity jurisdiction was lacking because the case made by the respondent as plaintiff does not present the essential elements of a justiciable case or controversy, and is a mere application for a declaratory judgment or decree. (R. 137; R. 160; R. 621.)

The respondent thereupon claimed, and the Circuit Court of Appeals has held, that the bill of complaint was not an application for a declaratory decree because it is sustainable in equity as a bill to remove clouds from title.

To reach that conclusion, the Circuit Court of Appeals, overruling the petitioners' contention that no cloud upon title exists, decided an important question of local law in a way in conflict with applicable local decisions in that said court has decided certain facts do constitute a cloud upon title to Illinois realty, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The petitioners further contended (R. 169-172, 617-621 and elsewhere in briefs), but the Circuit Court of Appeals by its opinion denies (R. 600 *et seq.*), that equity jurisdiction was lacking because the respondent's bill is an application for a court of chancery simply to construe the respondent's own muniment of title and thereby unlawfully to adjudicate in equity the respondent's own doubtful title.

The Supreme Court and other Circuit Courts of Appeals have held equity has not such jurisdiction.

3. The petitioners further contended (R. 165-172) that the respondent asks the court to make new contracts between the parties. The District Court's opinion sustained this contention, but the Circuit Court of Appeals considered otherwise.

Courts of equity of the United States have no such power.

(b) Federal Jurisdiction.

The petitioners contended that federal jurisdiction was lacking because the case was wrongfully removed from the state court to the federal courts, in that citizens of the same state are plaintiff and defendant and no separable controversy exists as to the removing party.

The Circuit Court of Appeals wrongfully denied the petitioners' motion to remand, as is provided for in the Removal Act.

Statement of the Case.

Chicago Auditorium Association, the respondent, commenced this lawsuit on June 13, 1923, by the filing of its bill of complaint (R. 3) in the Circuit Court of Cook County, State of Illinois. Defendants other than these petitioners procured its removal to the federal courts, where all proceedings have transpired.

The petitioners are owners of some 80 per cent of the ground upon which the nationally-known Auditorium Building in Chicago is situated. The petitioners also own that portion of the building situated on their fee. (*Bass* v. *Metropolitan W. S. E. R. Co.*, 82 Fed. 857.) The remaining 20 per cent is owned by other parties who, like these petitioners, were made defendants below.

The respondent is the tenant of the property under written long-term leases.

The litigation arises from the desire of the tenant to tear down the building and to erect on the land a wholly different building adapted to commercial purposes, all without our consent and without the consent of other landlords and a mortgage trustee.

Chicago Auditorium Association is an Illinois corporation (R. 3), organized in 1886 for the purposes of constructing and maintaining a building in Chicago, to contain a large auditorium and to provide facilities for cultivation and promulgation of the fine arts, and the like. In 1887, the Association leased five adjacent tracts of land in the business district of the city under five substantially similar indentures for 99-year terms. (R. 34, 51, 68; and see R. 10.) Exhibits 2 and 4 (R. 34 and 51) are copies of those leases made with these petitioners' predecessor as lessor, covering two tracts, each tract being about 40 per cent of the total ground area. In 1891, the terms of three of the leases, including our two, were extended 100 years. (R. 48, 65, 85.)

On the five tracts, the Association, pursuant to prearranged plans (R. 223) and covenants in its leases (*e. g.*, R. 34-5), erected during the years 1886-7-8 the present monumental Auditorium Building—an edifice of such note that both the president and the vice president of the United States attended its dedication. (R. 248.) Its walls enclose a 300-room hotel, many offices and studios, a recital hall, and one of the world's finest auditoriums. (R. 247-251.)

In the course of promotion and construction, the association conveyed its leaseholds to Illinois Trust & Savings Bank, an Illinois corporation (now Illinois Merchants Trust Company), as trustee to secure two bond issues aggregating par of $2,500,000 (R. 15-16), of which

some $1,375,000 are still outstanding. (R. 205.) The two trust deeds (R. 202-205) are not released, and the trustee is a party defendant to the bill of complaint.

The building has served and continues to serve well the institutional purposes for which the Association was organized (R. 3) and financed. (R. 391.) There has been no failure of the Association to pay its rent or taxes or similar fixed charges. So far as the landlords and the bondholders or trustee are concerned, no complaint of any nature has ever been made. However, newcomers, unconcerned with the civic aspirations which fostered the Auditorium enterprise, have recently acquired control of its capital stock (R. 245, 259), have changed its chartered purposes (R. 199; 4), and have proposed, if the courts would help them (R. 239), to tear down the Auditorium Building in order to replace it with a commercial skyscraper from which they "would get a benefit, a large revenue". (R. 258.)

It was and is and must be admitted by everyone that the leases and the trust deeds do not *expressly* grant to the Association, as tenant and obligor, the right to tear down and remove the existing building under any circumstances whatsoever, even to rebuild. Whether, under any and all the provisions of the leases and of the trust deeds, that right was conveyed *impliedly* called for the answer, as respondent itself states (R. 29) to "a *question* which, as between your orator and the defendants owning or interested in the fee, * * * presents a common issue of law and fact substantially identical with respect to the interests of the said several defendants". The *answer* to the question lay and still lies in the meaning and effect of the leases and the trust deeds. No other instrument of grant or limitation exists.

Counsel for the Association, when consulted by its pres-

ident, gave a qualified opinion (R. 241) that upon certain conditions it might tear down and replace the building. However, the Association's counsel deemed it advisable to obtain unanimous consent to the program, and the views of the landlords and of the securityholders became important. The task of sounding them out fell upon Mr. R. Floyd Clinch, the president.

No approach ever was made to the mortgage trustee prior to the filing of this suit; but, when made a defendant, the trustee appeared and vigorously resisted the Association's claims. (R. 104, 135, 143.)

In September or October of 1921, President Clinch while on a railroad train chanced to meet Mr. Mitchell D. Follansbee of Chicago, whom he knew to be counsel for one set of fee owners. These were the owners of only one of the five tracts, constituting about 10 per cent of the total area under the Auditorium. They were and are all residents and citizens of the states of New York and Massachusetts (R. 112-116), and are known in this record as the Sears-Slater trustees, successors in title to the Pecks as lessors under Exhibits 6 and 7. (R. 68 and 85.) The conversation between President Clinch and Mr. Follansbee (R. 240-1) was quite casual and, naturally, noncommittal on the part of Mr. Follansbee who previously had not heard of the Association's new project.

Nothing more appears for about seven months. Then, on May 27, 1922, President Clinch, with his counsel, met some of the Sears-Slater trustees in Chicago, and he laid before them the proposition of buying their fee or of paying more rent for the right to tear down and rebuild. (R. 241-2.) The conference was informal and friendly. It ended in a probable understanding that the Association would buy the Sears-Slater fee for $350,000

if some equally satisfactory arrangement could be made with these petitioners (R. 242), "the Willing interests".

Again, the following morning, these same men met with counsel for the Sears-Slater trustees. (R. 242.) Nothing was done; and little was said except that the deal discussed the previous evening might as well await similar negotiations with the Willing interests.

Up to this point, the Willing interests, *i. e.*, these petitioners, had not been brought into the negotiations. A month or so later, President Clinch called, "sat down and had a discussion". (R. 242.) He mentioned the negotiations with the Sears-Slater trustees and said any satisfactory deal called for an agreement with the Willing interests. "Mr. Willing seemed to think that he didn't know whether he cared to sell; that he disagreed with me as to our ideas of right to reconstruct without consent, but * * * might sell for $1,500,000." (R. 242-3.) President Clinch said that was out of the question, and that if they "could not come to any closer terms I presumed the only thing to do would be to bring a friendly suit in equity. Well, [Mr. Willing] said he guessed that was the only thing that could be done. * * * I do not remember more in detail just what Mr. Willing said about disagreeing with me on the right to tear down the building. He said they had also consulted attorneys and his conclusions were arrived at after advice from his attorneys that we did not have the right to tear it down." (R. 243.)

The above conversation is elaborated somewhat under questioning by Judge Wilkerson (R. 253-5), but nothing here material was added. The foregoing is the version given by President Clinch. There was no threat of any kind by these petitioners; all was oral, friendly, informal and, at most, evidenced a divergence of opinion as to the

legal effect of the leases—a divergence which was quite incidental to discussion of possible sale and purchase of the Willing fee.

In none of the conferences did President Clinch mention the giving of security to protect the landlords during the proposed periods of demolition of the present building and of the construction of his projected new one. Nor did he mention waiving the tenant's right to receive from the landlords the appraised value of the building on the premises at the end of the term of the letting. These so-called offers to do equity made their debut in the bill of complaint. (R. 28, 30.) Indeed, the proposition urged by respondent in its bill of complaint for decretal enactment never was submitted in like terms to any landlord prior to suit.

This one private conference includes literally everything done or said by these petitioners to "cloud" respondent's title. If other persons, such as investment bankers with whom respondent ever chose to deal, later learned of the Willing interests' position, they did not learn it from the Willing interests.

No other or further negotiations were attempted. After a tranquil year, this suit was commenced by the Association.

After alleging that the building has become obsolete in design, incapable of alteration without unjustifiable expense, and unprofitable in operation, the Association averred that the highest and best use of the property for the financial gain of the tenant would be its replacement by a modern skyscraper adapted to commercial purposes. (R. 257-8; 364.) Nevertheless, continues the bill (R. 28; also at R. 239), "the defendants * * * or some of them" "claim and assert, and by reason of such claim and assertion" bankers asked to finance the proposed new un-

as defendants to the bill, made motions to dismiss under Equity Rule 29. (R. 137.)

On April 18, 1924, Judge James H. Wilkerson, District Court Judge, overruled the motions to dismiss (R. 140), but he simultaneously filed his "Decision On Motion To Dismiss" (R. 140), stating that the points urged in support of the motion could be pressed after the testimony had been taken. Thereafter the petitioners answered (R. 160), preserving the points of equity (R. 169-171) and federal (R. 164) jurisdiction. Much evidence was received, for under the conditions thus imposed both sides went into the factual issues. The petitioners made objections to the reception of all evidence (R. 201-2) inconsistent with their contentions as to jurisdiction, but the objections were overruled. (R. 202.)

The testimony tended to show that the building, though designed and erected by respondent, had become obsolete; that the environment had changed, though admittedly for the better; that operation always had been financially unprofitable, though profits had never been seriously anticipated (R. 391); that by reason of settlement of the floating foundations, some structural distortion had resulted and might again result, though settlement had virtually ceased; and that increasing maintenance costs, taxes and the like caused the Association to be alarmed about future ability to meet its obligations.

These matters are set forth at length in Judge Wilkerson's opinion; for they had been stressed by the respondent as having some general bearing upon the ability of a chancellor to grant relief. The petitioners' general objection to this kind of testimony was supplemented by the further point that hardship, if any, not attributable in the slightest degree to us, failed to sanc-

tion equity jurisdiction to grant a construction or an alteration of the leases which might alleviate such condition.

On December 7, 1925, the trial judge made his decision (R. 542) which, in effect, sustained the petitioners' motion to dismiss. Judge Wilkerson declared the bill of complaint not sustainable as a bill to remove clouds from title because no cloud existed, and not sustainable under any other principle of equitable relief. On January 30, 1926, a short decree dismissed the bill "for want of equity jurisdiction to grant any relief upon the pleadings and evidence, but without prejudice to whatever rights the plaintiff may have under the leases here involved when asserted in any appropriate proceeding or otherwise". (R. 563.)

An appeal was taken by Chicago Auditorium Association (R. 568; Feb. 9, 1926) to the Circuit Court of Appeals for the Seventh Circuit, which, on June 7, 1927, entered judgment (R. 611) reversing the decree and remanding the case to the District Court with directions to hear the evidence and determine the issues involved. Rehearing prayed by these petitioners (R. 613) was denied on August 30, 1927 (R. 664), but mandate was stayed (R. 665) for the filing of a petition for a writ of certiorari in the Supreme Court. That petition was filed, and, on November 21, 1927, this court granted the writ. (R. 668.)

The Circuit Court of Appeals holds flatly that "the instant suit is properly cognizable in a court of equity" as "one to remove a cloud on title". (R. 608.) The cloud is described as follows:

> "And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if ac-

> complained by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title." (R. 602.)

That is to say, the Circuit Court of Appeals here holds that a peaceful difference of opinion between two contracting parties as to the meaning and effect of their leases under which one as the tenant occupies and uses realty owned by the other, evidenced entirely by conversations between themselves, clouds the tenant's title to an extent and in a manner sanctioning judicial intervention to "remove" such "cloud".

To reach that conclusion, and particularly its conclusion as to what constitutes a cloud upon title, the Circuit Court of Appeals completely ignored the many decisions of the Supreme Court of Illinois holding that a title is not clouded by oral hostile assertions of opinion as to the construction of provisions in the instrument under which a plaintiff claims his own title. The Circuit Court of Appeals omits adequate explanation for its decision thus conflicting with local law. And in remanding the case, the Circuit Court of Appeals fails to inform the trial court what to remove as a cloud or how to remove it, though respectfully requested to do so. (R. 617.) Likewise, said court fails to explain its avoidance of decisions of the Supreme Court of the United States and of other Circuit Courts of Appeals, holding that a court of equity has not jurisdiction simply to construe a plaintiff's own muniment of title for the primary purpose of adjudicating the plaintiff's own title. And the Circuit Court of Appeals responds to our contention—that the respondent simply seeks a declaratory decree—by saying the bill is properly cognizable as one to remove a cloud on title. (R. 608.) We think that the bill is not properly so cognizable, and that, therefore, the

theory upon which the Circuit Court of Appeals sustained equity jurisdiction is erroneous.

Had the case been decided in an Illinois court, your petitioners believe compliance with Illinois substantive law would naturally have brought about a result directly contrary to the lower court's reversal. Your petitioners believe that both the United States District Court and the Circuit Court of Appeals wrongfully persisted in retaining federal jurisdiction under the Removal Act. Twice these petitioners have attempted to have the case remanded, but in vain.

The original bill of complaint was filed in the Circuit Court of Cook County, an Illinois state court, by an Illinois plaintiff. Its removal to the federal court was procured upon petition of the defendant Sears-Slater trustees, owners of one fee, not citizens of Illinois. Their petition (R. 112) recites the diversity of citizenship and avers a separable controversy between the Illinois plaintiff and said Sears-Slater trustees as defendants.

After removal, these petitioners filed in the District Court their motions to remand to the state court (R. 194-5) on the grounds that no separable controversy under Sec. 71, Chap. 3, Title 28, United States Code, (formerly Sec. 28 of Jud. Code as amended, Act Jan. 20, 1914, c. 11) exists. The pertinent provisions are:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the

> United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *"

The motion was overruled in the District Court (R. 196-7) without opinion.

Again in the Circuit Court of Appeals by leave the motion was renewed (R. 635) and again was overruled without comment. (R. 664.)

The lease of the Sears-Slater trustees with the respondent and the two leases of your petitioners with the respondent are identical in all relevant provisions. (R. 34, 51, 68.) The respondent's bill of complaint itself declares the question to be decided is "a common issue of law and fact substantially identical with respect to the interests of the said several defendants". (R. 29.) It also says that the five tracts of land form one contiguous area covered by "one entire building". (R. 17.) "None of those parts of said building which are located upon the respective tracts of ground demised by [these petitioners'] leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially

identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

The position in this case of the Sears-Slater trustees as to their 10 per cent of the fee and the position in this case of these petitioners as to their 80 per cent are identical in all substantial respects. The issue is the same.

Furthermore, an unexpired first mortgage of February 1, 1889, by the tenant conveyed the leasehold as a whole on all tracts. So did an unexpired second mortgage in 1892. (R. 15 and 16.) The mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois.

Should relief complying with the prayer of the bill of complaint ever be granted, such relief must be spread over the whole property as against all fee owners, all bondholders, and all others interested. The question must be decided, if at all, by a construction of the trust deeds and the leases, and the lease of the Sears-Slater trustees is identical with the leases of your petitioners in all relevant provisions. No different question is to be decided as between the tenant and either set of landlords.

While the removing Sears-Slater trustees are not citizens of Illinois, your petitioners are and at all relevant times have been citizens of Illinois, which is the state of citizenship of Chicago Auditorium Association. The mortgage trustee, too, always has been a citizen of Illinois. And the record indicates that the Chapins, own-

ers and landlords of the remaining 10 per cent (called the Studebaker fee), not heretofore specifically mentioned, are citizens of Illinois; their leases are identical in all material respects and are affected.

Hence, the petitioners were wrongfully denied a return to the proper forum and were erroneously compelled to stay in courts where local agencies for administration of applicable state law were unable to protect local property rights.

The petitioners, therefore, submit that by its review of this case the Supreme Court should reverse the judgment of the Circuit Court of Appeals and either affirm the decree of the District Court or else, by appropriate orders, return the case to the Circuit Court of Cook County, State of Illinois.

POINTS AND AUTHORITIES.

A. Equity Jurisdiction.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THE INSTANT SUIT IS PROPERLY COGNIZABLE IN A COURT OF EQUITY" AS "ONE TO REMOVE A CLOUD ON TITLE".

The above quoted matter is taken from the lower court's opinion where the court explains why the suit is not an application for a declaratory decree construing the leases and establishing rights thereunder. (R. 608.)

The "cloud", states the lower court after expressing an inclination to follow "liberal holdings" in states other than Illinois (R. 602), consists of the landlords' "position respecting the lease, this written document of record (which position is manifested by oral pronouncement and by their refusal to consent to the rebuilding) *in addition to the* [doubtful] *clauses* [in the leases]" (R. 603; italics by the court). This definition of a "cloud" is to be taken with the earlier statement in the opinion (R. 602) that—

> "* * * though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title."

All of which is to say, this Circuit Court of Appeals lays down the rule that ambiguous provisions in the only instrument by which an owner has his own title, plus a disagreement as to those provisions between said owner

and his grantors manifested merely by oral conversation between themselves, constitute a cloud upon the title which a federal court of equity has traditional power to remove.

The title, thus said to be clouded, is the leasehold of the respondent in realty situated in Illinois, made possible and defined by Illinois law as real estate.

(1909) *People* v. *Shedd*, 241 Ill. 155; 89 N. E. 332.

I.

THE SUBSTANTIVE LAW OF THE STATE OF ILLINOIS, AND NONE OTHER, IS APPLICABLE TO DETERMINE THE RESPONDENT'S TITLE OR WHETHER THE TITLE IS CLOUDED.

(1914) *Guffey* v. *Smith*, 237 U. S. 101.
(1883) *Holland* v. *Challen*, 110 U. S. 15.
(1839) *Clark* v. *Smith*, 38 U. S. 195.

The rule also appears in appropriate phraseology in (1923) *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 on 499-500, where the court was considering the availability of equitable remedies in federal courts as affected by local law. The court held that state law could not enlarge or diminish the *form* of relief a federal court can give, but that the substantive rights over which such relief may extend can be conclusively determined by the state, saying (Italics ours):

> "For instance, a statute provides that a deed, void on its face, shall be deemed a cloud, whereas theretofore it was not. *It declares 'what shall form a cloud on titles.'* As stated in *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 410, the federal court looks 'to the legislation of the state in which the court sits [and the land is situated] to ascertain what con-

stitutes a cloud upon the title, and *what the state laws declare to be such the courts of the United States, sitting in equity, have jurisdiction to remove*'."

This long-established principle, holding that where state law has created, defined or vested property rights in landowners such law controls federal courts in applying remedies dealing with those rights, was not observed by the Circuit Court of Appeals. For—

II.

DECISIONS OF THE HIGHEST COURT OF THE STATE OF ILLINOIS HOLD THAT DOUBTFUL PROVISIONS IN AN OWNER'S MUNIMENT OF TITLE, COUPLED WITH ORAL HOSTILE ASSERTIONS AS TO SAID PROVISIONS BY AN ADVERSE CLAIMANT, DO NOT CONSTITUTE A CLOUD UPON THAT TITLE.

A leading Illinois decision is (1916) *McCarty* v. *McCarty*, 275 Ill. 573, where the essential facts are nearly similar to those in the instant case. The owner's muniment of title was a will, an instrument of record, and it contained clauses of doubtful meaning which led adverse claimants to dispute orally the owner's title and to claim substantial interests for themselves. In the course of litigation instituted by the owner in possession, the Illinois Supreme Court was asked by him to sustain his bill of complaint as one to remove clouds. The Supreme Court, holding that no cloud upon title existed, said (Italics ours):

> "Considered as a bill to quiet title, or remove a cloud, there was no averment of fact that would give the court jurisdiction. * * * The only averment in the bill respecting any claim contrary to [complainant's] right was that some of the relatives of the testator were [orally] contending that

> the remainders were vested and not contingent and that it was not possible to destroy such remainders; but *courts of equity do not take jurisdiction to remove a mere verbal assertion of ownership in land as a cloud upon title.* * * * A cloud upon a title is a claim apparently valid which may be removed by extrinsic evidence, but if there was any defect in the title of [complainant] it appeared on the face of the will and resort to extrinsic evidence was not necessary. * * * No controversy in any legal form has arisen, and there is no occasion to call upon a court to quiet *a title already quiet and in a state of perfect tranquility.*"

Again, in (1918) *Greenough* v. *Greenough*, 284 Ill. 416, the Illinois court was asked to sustain equity jurisdiction under the cloud-removal theory where the terms of a recorded instrument were doubtful and adverse oral claims, based thereon, were made against the owners thereunder. The Illinois Supreme Court observed that it was met at the threshold of the case with the objection that the court was without jurisdiction because, among other reasons, "a bill will not lie to remove a *supposed* cloud upon a title the basis of which is a verbal claim to an adverse interest" based upon provisions of the plaintiff's own granting instrument. The court sustained the objection, dismissed the bill, and said:

> "Neither can mere verbal claims of parties against an owner in possession be regarded as constituting a cloud on his title and as giving a court of equity jurisdiction to remove the cloud."

These decisions followed unbroken doctrine dating back to (1885) *Parker* v. *Shannon*, 114 Ill. 192, s. c. 121 Ill. 452, where an adverse claimant accompanied his oral assertions of ownership by acts of violence. The owner

sought relief by filing a bill to remove his adversary's oral claims as clouds on title. Relief was denied, the Supreme Court declaring:

> "A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property, as a cloud upon the title. Such clouds upon title, as may be removed by courts of equity, are instruments or other proceedings in writing, which appear upon the records and thereby cast doubt upon the validity of the record title."

Again, in 1889, the Illinois court defined a cloud upon title in *Rigdon* v. *Shirk*, 127 Ill. 411, as follows (Italics ours):

> "A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, *appearing in some legal form*, but which is, in fact, unfounded, or which it would be inequitable to enforce."

There is no break or deviation in application of the rule. The cases also include:

(1922) *Buckner* v. *Carr*, 302 Ill. 378.
(1917) *Warren* v. *Warren*, 279 Ill. 217.
(1913) *First Congregational Church* v. *Page*, 257 Ill. 472.
(1913) *Glos* v. *People*, 259 Ill. 332, 342-4.

Thus, by the property law of the state where the property is situated, a title is not clouded by an adverse claimant's position, orally manifested, as to, or in addition to, doubtful provisions in the owner's muniment of title. Under local law, a cloud must be real, definite, concrete—something capable of removal. It is an instrument or other proceedings in writing appearing of record, though not the same instrument which a plaintiff must produce to show his own title, which asserts

in some legal form an adverse claim that is invalid, but which requires evidence extrinsic to the record title in order to prove the invalidity.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, HOLDING THAT DOUBTFUL PROVISIONS IN THE RESPONDENT'S MUNIMENT OF TITLE, COUPLED WITH THE POSITION OF THE PETITIONERS BASED THEREON AND MANIFESTED ONLY BY ORAL STATEMENTS, CONSTITUTE A CLOUD UPON TITLE, IS IN CONFLICT WITH THE PROPERTY LAW OF THE STATE OF ILLINOIS.

The "position" of these petitioners, which leads in the Circuit Court of Appeals' definition of the "cloud" in the case here under review, is neither an instrument or other proceedings in writing ever appearing of record; and it was manifested, before suit, in the one talk between President Clinch and our Mr. Willing. The "refusal" of these petitioners to consent to the now proposed rebuilding, secondly entering into the lower court's definition, never came about until after the bill of complaint was filed for the very good reason that the respondent did not lay before these petitioners, or any one else, the proposal as it at the trial was submitted to the District Court. The "clauses" in the leases, mentioned in the excerpt from the trial court's opinion, which, "in addition to" our "position" and our "refusal" combine themselves into a "cloud", as it is said, are portions of the leases between the petitioners as landlords and the respondent as tenant; indeed, the clauses make up by far the greater part of the documents, which are the only possible instruments the respondent has produced to show its own title. No extrinsic evidence to prove the averred invalidity of what the petitioners orally claim as to those clauses is neces-

sary, or, we think, possible. If our position be wrong, it can and must be shown to be wrong by the leases themselves and in no other way.

Hence, the decisions of Illinois are conclusive that if this case were presented to the Supreme Court of Illinois, that court, in line with its established rule, would order dismissal of the bill for the reason no cloud on title exists. The same result should have been obtained in the Circuit Court of Appeals, and that court's disregard for local law is sufficient, we submit, here to lead to a reversal of its judgment.

No useful purpose would be served by a detailed differentiation of the decisions mentioned and relied upon in the opinion of the Circuit Court of Appeals during its delineation of a cloud, because not one is an Illinois decision. The courts of nine states other than Illinois are looked to for support of a "liberal" holding.

The one decision of this Honorable Court found by us and bearing upon the immediate question also is ignored —(1906) *Devine* v. *Los Angeles*, 202 U. S. 313, where the court, disposing of a somewhat similar contention urged by a litigant to sustain equity jurisdiction, said:

> "We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title * * *."

The only Illinois decision, bearing upon the issue, which seems to have received consideration by the Circuit Court of Appeals was *First Congregational Church* v. *Page*, 257 Ill. 472, also cited above. (p. 23.) There the bill, in so far as it was submitted on the cloud-removal theory (p. 477), was ordered to be dismissed because, the Supreme Court says, it was simply one to construe the plaintiff's own deed of grant. There were doubtful clauses in the deed, and there were adverse claims or po-

sitions orally manifested; but the Illinois court declares (p. 477):

> "It would be a rather anomalous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims title."

In the case at bar, removal of the "cloud" erected by the lower court in its opinion would necessitate literal elimination from the leases of several covenants granting rights to the tenant and reserving rights to the landlords. For instance, the leases provide (R. 42) that the building is security for rent and for the performance of all other covenants imposed upon the tenant; but the tenant desires to destroy that security and to substitute some other security not permitted by the leases. Other covenants, such as covenants requiring the tenant to "keep the building situated upon the demised premises * * * in good repair and in a safe and secure condition * * * and all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease" (R. 42); to rebuild or repair the building, in event of damage or destruction by fire, upon the same plan as was followed in the original structure (R. 43); or the covenant requiring the landlords to pay the tenant the appraised value of the improvements at the end of the term (R. 45),—all are contained in clauses granting or reserving rights, just like the clauses in the above Illinois case of *First Congregational Church* v. *Page*, 257 Ill. 472. The petitioners contend that by these and other clauses in the leases, the tenant may not lawfully tear down the Auditorum. Therefore, if the Circuit Court of Appeals' delineation of a "cloud" be correct, removal thereof would require virtual elimination of all such covenants in the granting provisions of the leases. In fact, a conservative calcu-

lation discloses that removal of the so-called doubtful clauses would strike out one-eighth part of each lease. As the Illinois court observes, that, indeed, would be a rather anomalous situation.

The only method by which any court of equity could conceivably grant the relief prayed by the respondent in this case would be either (1) to strike down as clouds the clauses of the leases which support the landlords' position as invalid provisions, or (2) to adjudicate, by the process of decretal construction of the leases, that the landlords' position is wrong. Of the latter, more presently. The former cannot, as we have demonstrated, be lawfully done. The removal of a cloud demands the existence of that which under applicable law *is* a cloud, and then the nature of practical equitable relief calls for its actual removal: an extraneous instrument is to be canceled or released, etc. An attempt to draft a decree adapted to the prayer of the bill shows the inability of the remedy here. The draftsman finds it necessary to construe and alter the leases—then he is done. And that brings us to our next point:

IV.

THE RELIEF SOUGHT BY THE RESPONDENT, WHICH THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HOLDS IS PROPER, IS AN ADJUDICATION OF ITS OWN TITLE BY THE PROCESS OF CONSTRUING ITS LEASES AND DECLARING THE RIGHTS OF THE PARTIES THEREUNDER.

The contention of the respondent appears in the bill thus (R. 28):

> "Under the proper construction and interpretation of the terms, covenants and conditions of said several leases, your orator is fully empowered and has the right to tear down and remove the present

improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors * * * upon furnishing proper and adequate security during the removal. * * *"

The prayer for relief (R. 31) asks "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises" upon giving security to be fixed by the court until a new building is completed.

The fundamental and controlling question presented, whatever be the head of equity jurisprudence invited, is this: Has the respondent the right, or title, it claims to have under the leases? To answer that question, a court invariably must commence by finding and clarifying the respondent's own title before ever entering upon any inquiry as to the claims of others. Furthermore, and most important to the point now under presentation, it becomes obvious that such finding and clarification of the respondent's own title simultaneously answers the above fundamental and controlling question of the whole case. The reason is that the claims of the respondent and the claims of the petitioners are *conflicting*. And, inasmuch as the conflict of claims grows out of differing views as to the meaning and effect of the leases, it becomes equally obvious that one movement—the construction of the leases—determines every main issue in the case.

But bills to remove clouds from title are not the proper approach in order to receive a judicial decision as to conflicting claims of parties signatory to an instrument conveying land titles. Bills to remove clouds do not lie simply to obtain judicial interpretation of a plaintiff's own granting instrument. Bills to remove clouds presuppose the validity and existence of a plaintiff's own title, and are directed exclusively against the alleged invalid claim of a defendant, to be shown invalid by facts extrinsic to the plaintiff's own recorded evidence of title:

(1894) *Wehrman* v. *Conklin*, 155 U. S. 314 on 322.

(1907) *Lawson* v. *United States Mining Co.* 207 U. S. 1.

(1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375.

To the same effect is (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, with which decision by the Circuit Court of Appeals of the First Circuit the decision of this Circuit Court of Appeals cannot be reconciled.

The respondent, as plaintiff, was and is compelled to admit its own averred title is doubtful. If that were not so, the respondent would have proceeded to tear down the Auditorium Building without awaiting decretal declaration of its rights. To resolve the doubt, the respondent submits the question of *conflicting* claims for an adjudication which, however named, amounts exactly to a decree declaring the rights of the tenant under the leases. The lower court declares the procedure, when released from binding limitations of local property law, a proper function for a federal court of equity. That holding, we submit, is a departure from the rules laid down by this court and in conflict with the weight of authority in other courts.

V.

THE CASE SET UP BY THE RESPONDENT IS NOT EMBRACED WITHIN ANY PRINCIPLE OR HEAD OF EQUITY JURISPRUDENCE, AND IS AN APPLICATION FOR A DECLARATORY DECREE NOT WITHIN THE JUDICIAL FUNCTION.

The essential elements of a justiciable case or controversy, over which the jurisdiction of courts of the United States extends, have been stated with unmistakable certainty in landmark decisions:

(1910) *Muskrat* v. *United States*, 219 U. S. 346.

(1916) *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466.

(1920) *United States* v. *Alaska Steamship Co.*, 253 U. S. 113.

(1926) *New Jersey* v. *Sargent*, 269 U. S. 328.

One such element is that of a wrong done by a defendant to a plaintiff. Such a wrong must be a legal wrong; it must be some unlawful invasion of a plaintiff's rights. In this case, the plaintiff's right is said to be its title to its leasehold. Since, as we have shown, that right or title is permitted and defined exclusively by and under the laws of the State of Illinois where the property lies, it follows that Illinois law must and does determine whether the acts of the petitioners constitute any legal wrong or invasion of that right. We have also shown that under Illinois law the acts charged against the petitioners are not legal wrongs, that the title or right of the respondent is not thereby clouded or assailed in any legal form. Therefore, the essential element of a wrong is wholly lacking, no case is presented, and jurisdiction does not exist. As was said under similar circumstances in (1916) *McCarty* v. *McCarty*, 275 Ill. 573, "No contro-

versy in any legal form has arisen, and there is no occasion to call upon a court to quiet a title already quiet and in a state of perfect tranquility".

Counsel for respondent have complained that this kind of attack by us is an antiquated adherence to forms of procedure. A reflection of the complaint appears in the reference of the Circuit Court of Appeals to "a cabinet of standard labels" to be affixed to bills of complaint and thereby indelibly to classify them. We have not called upon counsel for respondent to classify the bill under any established principle simply in order to affix a label or provide a caption. The challenge was sounded, and is here repeated, that the respondent may point out, if it can, what known principles of equity jurisprudence, if any, are applicable to enable a federal court of chancery to grant relief. In (1926) *New Jersey* v. *Sargent*, 269 U. S. 328, this Honorable Court reviewed the decisions of ninety years and concluded, "It is only where rights of persons or property are involved and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief". Whereupon, this court, furnishing contemporaneous authority for our challenge, proceeds to examine the record in the *Sargent* case to find the familiar essential elements of a judicial action. Not finding any wrong done by the defendant, and, hence, no case or controversy within the judicial function, the court says the bill cannot be entertained.

Here, too, the demonstrated inability of the respondent to point out and prove that any legal wrong has been done to the respondent by the petitioners or others should have resulted below in affirmance of the District Court's decree dismissing the bill.

Much has been said and more doubtless will be said by counsel for respondent about "the broad general jurisdiction of courts of chancery" in modern times. So broad is that field, they say, that equity's power is co-extensive with the needs of persons whenever actions on the law side of the court are inadequate or inappropriate. That is why, they argue, equity should compel the petitioners here to enable the respondent to make profitable use of its property; otherwise, they aver, the leases bargained fairly in 1887 will become oppressive.

But changing circumstances or hardships or lack of commensurate return do not excuse nonperformance of the covenants in the leases, and, since the petitioners are not in the least responsible for creation or development of these conditions, if existent, such conditions are not legal wrongs for which the respondent has any remedy against the petitioners:

(1865) *Ingle* v. *Jones,* 69 U. S. 1.

(1869) *Sheets* v. *Selden,* 7 Wall. 416.

(1896) *Blake* v. *Pine Mt. Iron & Coal Co.,* 76 Fed. 624 on 638.

(1895) *Postal Telegraph Co.* v. *Western Union Tel. Co.,* 155 Ill. 335.

Therefore, under any and all of its theories, the respondent completely fails to show the essential elements of a justiciable case or controversy in that the petitioners have neither clouded the title nor otherwise wronged the respondent, and furthermore, in that the primary right or title of the plaintiff is confessedly doubtful. The direction of the Circuit Court of Appeals to the District Court is a direction to construe the leases in order to guide the parties as to future conduct. That, of course, is a declaratory proceeding not within the jurisdiction of the federal courts.

Illinois has no declaratory judgment or other statute under which jurisdiction can be sustained. This suit, upon the same considerations, would fall in the state courts:

(1900) *Seely* v. *Baldwin*, 185 Ill. 211.
(1911) *Paine* v. *Doughty*, 251 Ill. 396.
(1919) *Prather* v. *Lewis*, 287 Ill. 304.

Even if Illinois had a declaratory judgment statute or any statute of similar nature, the federal courts are forbidden to apply its remedy:

(1927) *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

VI.

AS A BILL TO DECLARE RIGHTS UNDER THE LEASES, THE EXERCISE OF JURISDICTION WOULD BE PARTICULARLY ERRONEOUS BECAUSE A COURT OF EQUITY IS CALLED UPON TO DECLARE AND ADJUDICATE A PLAINTIFF'S TITLE TO REALTY.

The law courts are zealous to retain their jurisdiction over the adjudication of land titles. There can be no commingling of legal and equitable remedies, or the substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is impaired. (1913) *Louisville & Nashville Railroad Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369 on 376.

Where the plaintiff's own title is doubtful, a bill in equity to remove alleged clouds therefrom will not lie:

(1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375.
(1887) *Frost* v. *Spitley*, 121 U. S. 552.
(1894) *Wehrman* v. *Conklin*, 155 U. S. 314.

The rule in Illinois courts is the same:

(1900) *Seely* v. *Baldwin*, 185 Ill. 211.
(1919) *Prather* v. *Lewis*, 287 Ill. 304.

Until universal adoption of the system of recordation of deeds, the courts invariably refused to entertain bills to remove clouds until after a plaintiff had established his own title by at least one successful suit at law. (1894) *Wehrman* v. *Conklin,* 155 U. S. 314. The rule has been modified only to the extent that a favorable judgment at law is not needed where the plaintiff's record title is clear and unassailable. But whenever the plaintiff's own title is not clear, or where there are, as here, *conflicting* claims growing out of the plaintiff's sole muniment of title, a suit to adjudicate the plaintiff's title cannot be sustained as a bill to remove clouds therefrom. That process, however, disguised, would become a declaratory judgment adjudicating title.

If, as the Circuit Court of Appeals holds, doubtful clauses in the leases plus our position orally manifested constitutes a legal wrong, then any tenant becomes able to obtain an adjudication of his title in equity through the fiction of creating a cloud upon his leasehold by talking with his landlord. This strange doctrine opens the doors of chancery to as many bills to remove such clouds as there are or may be differences of opinion between landlords and tenants, and, contrary to the decisions of this Honorable Court, places the declaratory judgment proceeding, so disguised, in operation.

B. Federal Jurisdiction.

THE PETITIONERS WERE WRONGFULLY PREVENTED FROM LITIGATING IN THE COURTS OF THE STATE OF ILLINOIS BY THE ERRONEOUS REFUSALS OF THE FEDERAL COURTS TO REMAND THE CASE TO THE STATE COURT.

The suit was begun in the Circuit Court of Cook County, State of Illinois, by Chicago Auditorium Association, an Illinois corporation and citizen. Its removal to the federal court was procured upon the petition (R. 112) of the defendants known as the Sears-Slater Trustees, not citizens of Illinois, owning one of the five adjacent tracts upon which the building stands and being now lessors under Exhibit 6. (R. 68.) Their petition for removal recites diversity of citizenship between the plaintiff and themselves and avers a separable controversy between that plaintiff and themselves.

We have consistently contended during the progress of the suit that no controversy distinct and separable from the controversy between the plaintiff and these petitioners exists between the plaintiff and the removing parties. Since these petitioners were at all times citizens of Illinois, our contentions took the form of motions to remand to the state court under the Removal Act, set forth above (p. 15, *ante*). Our motions in both District Court (R. 194-5) and Circuit Court of Appeals (R. 635) were denied (R. 196-7; 664), without expression of opinion.

The lease between the Chicago Auditorium Association and the Sears-Slater Trustees and the two leases between said Association and these petitioners are identical in all relevant provisions. The claims of the respondent with respect to all three leases are identical, as is averred in the bill. The position of the Sears-

Slater Trustees and the position of the petitioners with respect to the claims of the respondent in the suit are identical in all respects. The five tracts of land, three of which are owned by the Sears-Slater Trustees and the petitioners, form one contiguous area covered by one entire building. None of those indivisible parts of the building located upon the respective tracts is separable from the entire building as a whole. At the time of execution of the leases it was contemplated and intended by all the parties that a single building, not separable into parts apportionable to the separate leaseholds, should be erected, and the present building was constructed in accordance with such intention. The building cannot well be dismembered, and the respondent's suit is directed toward removal of the entire building to be replaced by another one covering the entire area. (R. 17, 29.) The unexpired mortgages convey the leasehold as a whole on all the tracts.

Any relief ever granted under the prayer of the bill must be spread over the whole of the property as against all the fee owners, all the bondholders, the mortgage trustee and all others interested. The issues upon the merits must be decided, if at all, by the construction of the leases and the trust deeds. So far as the issue involving the leases would be concerned, no question is to be decided between the Illinois tenant and the foreign Sears-Slater Trustees differing in any way from the question to be decided between the Illinois tenant and these petitioners who are citizens of Illinois.

It is obvious there is no separable controversy. There was only one controversy which affected alike all the defendants, and in any alignment of parties on either side of this controversy the Sears-Slater Trustees must be aligned with these petitioners (and other defendants) who are citizens of Illinois.

I.

THERE IS NO SEPARABLE, REMOVABLE CONTROVERSY UNLESS THERE IS A SEPARATE AND DISTINCT CAUSE OF ACTION AS TO THE DEFENDANTS SEEKING REMOVAL, WHICH CAN BE DECIDED AS BETWEEN SAID DEFENDANTS AND THE PLAINTIFF IN THE ABSENCE OF ALL OTHER DEFENDANTS:

(1892) *Torrence* v. *Shedd*, 144 U. S. 527.
(1882) *Fraser* v. *Jennison*, 106 U. S. 191.
(1884) *Ayres* v. *Wiswall*, 112 U. S. 187.
(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56.

If for no other reason, the presence of all the fee-owners would be indispensable in order for a court to adjudicate their inter-related rights. For instance, the nature of the property has brought into being cross-easements of support amongst the fee owners. The land of the petitioners touches the land of the Sears-Slater Trustees on two sides totalling 250.5 lineal feet. Crossing these boundaries the building rises at least ten stories, whereby easements have become appurtenant to each fee. (*Springer* v. *Darlington*, 207 Ill. 238; *Gibson v. Holden*, 115 Ill. 199; *Ingals* v. *Plamondon*, 75 Ill. 118; *Foote* v. *Yarlott*, 238 Ill. 54.) These easements are matters of concern to the reversioners, but the respondent's proposals for any new building would forever alter totally the existing arrangement. (R. 374-5.) Suppose, under these conditions, the bill had been filed against the Sears-Slater Trustees only: could any court grant to the plaintiff in such a suit the relief prayed in the present bill as to the Sears-Slater tract only? Surely not, because any decree against the Sears-Slater Trustees must of necessity include provisions bearing upon the easements and other rights of adjacent property-owners, these petitioners. This example also negatives the

suggestion, which has been made, that the instant case is a convenient bundle of separate causes of action (R. 660), and it demonstrates that all the fee owners are indispensable parties to the bill of complaint.

In all its aspects, there is only one controversy on one side of which stands the Illinois respondent and on the other side of which stands the Illinois petitioners and the Sears-Slater Trustees of Massachusetts and New York. The refusal of the two lower courts to remand the case seems palpable error. Surely the least that can be said is that the right to remove was doubtful, in which event the federal courts uniformly remand. (1918) *Thomas* v. *Delta Land & Water Co.*, 258 Fed. 758; (1919) *Boykin* v. *Morris Fertilizer Co.*, 257 Fed. 827; (1917) *Hansen* v. *Pacific Coast Asphalt Cement Co.*, 243 Fed. 283.

II.

IT BECOMES THE DUTY OF A FEDERAL COURT, AT WHATEVER STAGE OF LITIGATION IT DISCERNS THAT FEDERAL JURISDICTION IS LACKING IN A REMOVED CASE, TO REMAND IT TO A STATE COURT:

(1904) *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

(1890) *Graves* v. *Corbin*, 132 U. S. 571.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527.

Our principal concern is that the Circuit Court of Appeals decided the question of equity jurisdiction contrary to the land laws of Illinois. We think an Illinois court would not have countenanced the cloud upon title which the Circuit Court of Appeals erected. A return to the state forum would have enabled the petitioners to avail themselves of decision and of review of decision by those courts administering that law which the Circuit Court of Appeals ignores and, in effect, overrules.

CONCLUSION.

The result of the decision of the lower court, here under review, is the establishment of the following rule relating to equity jurisdiction:

> A federal court of chancery has original jurisdiction to construe and to alter written leases of realty whenever the landlord and tenant are unable to agree upon the meaning and effect of provisions in said leases to the future detriment of the tenant, because such provisions, if susceptible of doubtful construction even though the doubt be a forced one, when accompanied by an orally manifested position taken by the landlord contrary to an orally manifested claim made by the tenant, constitute a cloud upon the title of the tenant which a federal court, regardless of local law saying these facts do not constitute a cloud upon title, is empowered to remove either by construing the doubtful provisions or by striking said provisions from the leases.

The procedure, so established here, is without precedent and without authority. It is against precedent and is against authority of federal decision, and it violates the rule that local law controls federal judicial dealing with local land titles. By this procedure, parties to contracts involving rights to real property can usually devise such fictitious clouds and thereby manage to obtain judicial construction or alteration of the terms thereof, without the existence of any legal wrong done or threatened by one to the other. Thus is the forbidden declaratory judgment and decree made possible in federal courts. The result seems explainable under no hypothesis other than an adherence by the Circuit Court of Appeals to respondent's baldly as-

serted heresy that "in any extraordinary or unusual cases the extent of the need is the measure of jurisdiction". The answer is that when any federal court begins to measure its ability to apply judicial force solely by the alleged extent of the alleged need of one litigant, then does such federal court transgress the constitutional limitations placed upon the judiciary. If the present decision in this case be permitted to stand as a precedent, the courts of the United States are opened to the settlement of mere arguments.

Wherefore, the petitioners pray for the entry of judgment in the Supreme Court of the United States, reversing the judgment and orders of the Circuit Court of Appeals for the Seventh Circuit, because:

1. The Circuit Court of Appeals, by its decision, has erroneously decided an important question of local law in a way in conflict with applicable local decisions, in that said lower court has decided certain facts do constitute a cloud upon title to Illinois realty, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The Circuit Court of Appeals has sustained equity jurisdiction only by its erroneous erection of such cloud on title. Without that cloud, no wrong exists and no justiciable case or controversy is presented. Hence, the Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as a mere application for a declaratory decree.

3. The Circuit Court of Appeals has decided an important question of general law in a way conflicting with decisions of the Supreme Court of the United States and conflicting with decisions of other Circuit Courts

of Appeals, in that said court has held that a plaintiff's own doubtful title can be adjudicated by a court of chancery in his so-called suit to remove alleged clouds therefrom.

4. The Circuit Court of Appeals in remanding the case to the District Court has erroneously directed the District Court to consider the alteration of the terms of the leases, which result, if decreed, would be the unlawful making of new contracts between the landlords and tenant.

5. The Circuit Court of Appeals, by its refusal to remand the case to the state courts, has not complied with the requirements of the Removal Act, thereby further precluding the petitioners from the protection of that local property law which defeats equity jurisdiction by destroying the alleged cloud upon title constructed in the Circuit Court of Appeals.

Respectfully submitted,

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